PD-0736-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/13/2018 5:12 PM
Accepted 3/14/2018 9:20 AM
DEANA WILLIAMSON
CLERK

No. PD-0736-17

RECEIVED
COURT OF CRIMINAL APPEALS
3/14/2018
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JOHN KENNETH LEE,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from Cause No. 2-103764 in the
County Court at Law No. 2 of Victoria County, Texas, and
On State's Petition for Discretionary Review of
Cause No. 13-15-00514-CR in the
Texas Court of Appeals, Thirteenth Judicial District

BRIEF OF APPELLANT ON THE MERITS

Arnold K. Hayden, Jr.
State Bar No. 24065390
The Law Office of Arnold Hayden
P.O. Box 4967
Victoria, Texas 77903
Tel: (361) 573-4393
Fax: (361) 573-4394

ATTORNEY FOR APPELLANT
March 13, 2018

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Appellant submits the names and addresses of all interested parties and attorneys:

Trial Court

HON. DANIEL GILLIAM
Judge, County Court at Law No. 2
Victoria County, Texas

Parties

JOHN KENNETH LEE, Appellant
503 Cannon
Victoria, TX 77901

STEPHEN B. TYLER, Appellee
Criminal District Attorney
Victoria County
205 N. Bridge St., Ste. 301
Victoria, TX 77901

Attorneys at Trial

PATTI LEA HUTSON
Trial Attorney for Appellant
One O'Connor Plaza, Ste. 1102
Victoria, TX 77901-6549

JAMES "PINK" DICKENS
Trial Attorney for Appellee
Assistant Criminal District Attorney
Victoria County
205 N. Bridge St., Ste. 301
Victoria, TX 77904

JESSE THOMAS LANDERS
Trial Attorney for Appellee
Deputy Public Defender
Dallas County
133 N. Riverfront Blvd., Ste. C-1
Dallas, TX 75207

Attorneys On Appeal

ARNOLD K. HAYDEN, JR.
Attorney for Appellant
P.O. Box 4967
Victoria, Texas 77903

BRENDAN GUY
Attorney for Appellee
Assistant Criminal District Attorney
Victoria County
205 N. Bridge St., Ste. 301
Victoria, Texas 77904

TABLE OF CONTENTS

LIST OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Appellant was arrested on suspicion of driving while intoxicated on or about October 11, 2013. (I C.R. at 6.) On June 16, 2014, Appellant was charged by information with the Class B misdemeanor offense of driving while intoxicated. (I C.R. at 6.) On October 19, 2015, Appellant was tried by jury, convicted, and based upon the jury's recommendation, the trial court sentenced Appellant to one hundred and eighty (180) days confinement in the Victoria County Jail and an $1800 fine. (I C.R. at 32, 37.)

On June 15, 2017, the court of appeals reversed Appellant's conviction and remanded this cause to the trial court for a new trial. The State submitted a petition for discretionary review on July 12, 2107, which was granted by this Court on November 15, 2017.

ISSUES PRESENTED

1. Whether the court of appeals erred in finding that the State committed error in opening statements by disclosing blood results in a driving while intoxicated trial when the physical blood specimens and chain of custody evidence had been destroyed by law enforcement, the testifying phlebotomist could not recall drawing samples from Appellant, the testifying chemist could not determine whether the test results came from a sample drawn under a lawful search warrant or under a unlawful mandatory blood draw statute, and the blood results were properly excluded by the trial court.

2. Whether the court of appeals erred in finding that Appellant did not waive error on appeal by failing to object to the State's disclosure of the blood results during opening statements, when the State did not disclose to Appellant that the physical blood evidence had been destroyed until immediately prior to jury selection, the trial court overruled multiple objections to the testimony of witnesses brought solely to authenticate the blood results, and the trial court denied four motions for mistrial, including a motion raised immediately after the trial court ruled that the blood results were inadmissible.

3. Whether the court of appeals erred in holding that the trial court's limiting instruction was insufficient to cure harm and that the denial of Appellant's motion for mistrial was an abuse of discretion, when the State continued to bring attention to the inadmissible blood results disclosed in opening statements by presenting testimony that referred to the blood tests, to the degree that a limiting instruction directed at every mention of the blood results would only further reinforce the prejudice of the error wrought by the State's disclosure of the inadmissible results, and determining if Appellant would have been convicted without the erroneous disclosure of the blood results is a finding that cannot be made with certainty.

STATEMENT OF FACTS

On October 11, 2013, officers of the Victoria Police Department responded to the scene of a motor vehicle accident in the city of Victoria. (III R.R. at 48-49.) At the scene, a driver named Juan Vasquez indicated that his gray Chevrolet truck was struck from behind by a white GMC truck while he was stopped at the traffic light of an intersection. (III R.R. at 50-51.) The white GMC truck was driven by Appellant, John Lee. (III R.R. at 50-51.) At the scene, Appellant was arrested on suspicion of driving while intoxicated based upon law enforcement's belief that he failed to satisfactorily complete the field sobriety tests. (III R.R. at 106.)

After refusing to voluntarily provide blood or breathe samples, Appellant was taken to Citizen's Medical Center in Victoria to conduct a mandatory blood draw based upon non-serious bodily injury sustained to Mr. Vasquez during the accident. (III R.R. at 106-07.) According to the arresting officer, the mandatory blood draw occurred at approximately 11:15 PM, (III R.R. at 108), one and a quarter hours after the accident, which occurred at around 10:00 PM, (III R.R. at 19). A second blood specimen was also collected from Appellant pursuant to a search warrant approximately four hours after the accident. (III R.R. at 108.) Both samples were drawn by a phlebotomist and collected by an officer using a DPS blood collection kit and transported to the evidence room of the police department. (III R.R. at 107-111.)

Over two years after his arrest, Appellant case is called for jury trial, and Appellant is informed prior to jury selection that the blood evidence in his case had been destroyed:

> THE COURT: Okay. Very good. The defendant is present along with counsel, Ms. Hutson, and the attorneys for the state. Let me ask at this time, is the state ready to proceed?
>
> MR. LANDES: Ready, Judge.
>
> THE COURT: And is the defense?
>
> MS. HUTSON: Yes, defense is ready, Your Honor.
>
> THE COURT: Also, let me -- is there any pre-trial matters that we need to take up before we bring the jury panel in? First of all, from the state?
>
> MR. DICKENS: Your Honor, I will inform the Court and I have informed the defendant that the City of Victoria has destroyed the blood sample prior to trial. We don't have it, so --
>
> THE COURT: Okay.
>
> MR. DICKENS: -- I just found that out at lunch.
>
> THE COURT: Well, I guess the defendant is advised of record, you know what I am saying? So you do understand that, Ms. Hutson?
>
> MS. HUTSON: Yes, Your Honor.

(II R.R. at 4-5.)

The second day of trial begins with the State's opening remarks. (III R.R. at 8.) After reviewing the anticipated testimony of witnesses at the scene and discussing Appellant's refusal to give a voluntary blood or breath sample, the State reveals the following to the jury:

> MR. LANDES: Subsequently, [Appellant] was still transported to the hospital, and eventually a blood draw was taken. There were actually two blood draws, but the state, they tested one blood draw when it was sent to the lab.
>
> You will hear testimony from the phlebotomist who actually took the blood draw at Citizens Medical Center, and the lab technician who tested this blood sample from the Department of Texas Safety in the Weslaco lab in Weslaco, Texas, and determined that the blood alcohol content was .169.
>
> Ladies and gentlemen, the -- as we reviewed to you in voir dire, the legal definition of intoxicated, that is over double the legal limit. You will hear testimony to that effect.
>
> Ladies and gentlemen, the evidence will show that [Appellant] was guilty of the DWI because he caused a major accident, there was an injury, and the results will show that he was in fact intoxicated. At the end of this case, we'll ask you to find him guilty.

(III R.R. at 8-11.)

The State opens its case by calling three civilian witnesses from the scene of the accident and two law enforcement officers, Jason Sager and J. J. Houlton. (III R.R. at 17, 28, 38, 47, 75.) After the officers testify, the State calls the hospital phlebotomist, Beatrice Salazar. (III R.R. at 143.) Appellant objects to the

testimony of the phlebotomist after approaching the bench, outside the hearing of the jury:

> MS. HUTSON: I object to the testimony of this [witness]. State advises that they do not have any blood evidence in this case, they do not have the blood test tubes, so she would not -- she would have nothing to testify about without physical evidence. Also I have not had the opportunity to look -- The defendant has the right to inspect these blood tubes to verify that she was the person who drew the blood and it would be on that blood evidence.
>
> THE COURT: Well, I understand your objection, but I think that they can ask her what she does. I mean, to that extent, now --
>
> MS. HUTSON: Anything further than that would have to be supported by blood evidence.
>
> MR. LANDES: Judge, if we're talking about blood evidence, it's not going to come through this witness anyway, but she can testify as to chain of custody.
>
> MS. HUTSON: There is no chain of custody, none, because every bit of evidence that is related to chain of custody on is on the blood tube and packaging, and we do not have that, there is no chain.
>
> THE COURT: I understand what your objection is, but I'm going to give him leeway to see what is there. Do you understand what I am saying? Then you can object, you know, at the appropriate time then, okay?
>
> MS. HUTSON: Okay.
>
> THE COURT: Okay. You may proceed, Mr. Landes.

(III R.R. at 143-44.)

The testimony of the phlebotomist resumes in front of the jury, beginning with

an overview of her background and qualifications. (III R.R. at 144-45.) As the phlebotomist begins discussing drawing blood from Appellant on the night of the accident, Appellant objects once more and is overruled. (III R.R. at 146.) The phlebotomist testifies that while she does recall being told to take a blood sample during her shift on the accident, she doesn't remember drawing blood specifically from Appellant. (III R.R. 146-47) Instead, she says that it is her routine to sign a document provided by law enforcement that identifies the person when blood is drawn, and this document is kept by law enforcement. (III R.R. at 146.) This procedure requires her to draw blood with a syringe or vacutainer and transfer it into a vial, also provided by law enforcement. (III R.R. at 152.) The blood vial is given back to the officer, who labels the vial and places it back into a blood kit box. (III R.R. at 152.) After reviewing a document provided by the State to reflect her recollection, but not offered as evidence, the phlebotomist acknowledges that she drew blood from someone at 12:11 AM on October 12, 2013. (III R.R. at 145-48.) However, she cannot recall if blood was drawn from Appellant once or more than once that night. (III R.R. at 152.)

The State then calls Sergeant Kelly Luther as its next witness, who testifies that she supervises the Crime Scene Unit that is responsible for sending evidence to the lab to be tested. (III R.R. at 161.) Sgt. Luther admits that after the blood samples purported to be taken from Appellant were returned to the Victoria Police

Department from the DPS lab, she unintentionally destroyed the blood evidence. (III R.R. at 162-63.) This destruction occurred in January, 2015, due to a mistake on Sgt. Luther's part, who assumed that due to the age of the case that Appellant's case had already been disposed of. (III R.R. at 162-63.) Sgt. Luther also testifies that because the documentation indicating where the blood was collected by which officer was made by marking the physical evidence, destroying the evidence also destroyed the documentation for its chain of custody:

> [MS. HUTSON:] Can you tell the -- Okay. Can you explain to this jury what is on the outside of the evidence that we use that is so important to this jury trial?
>
> [SGT. LUTHER:] There is a seal, evidence seal that's on the – most evidence, anytime it's tagged in, there is a seal.
>
> [MS. HUTSON:] And on that seal does it show what I refer to as chain of custody of this evidence, where it starts and where it goes and where it ends up?
>
> [SGT. LUTHER:] Not necessarily, no. It would have the officer's initials, where the blood was once taken, they'll initial and date it.
>
> [MS. HUTSON:] And when you send it off to the lab and it's returned to you, does it have also on that container who received it at the lab and then who sent it back to you, and then your receipt of it? Isn't that all contained in that one thing?
>
> [SGT. LUTHER:] No.
>
> [MS. HUTSON:] That's not on there?
>
> [SGT. LUTHER:] No.

[MS. HUTSON:] The people that open it don't re-seal it and --

[SGT. LUTHER:] Yes, they re-seal it --

[MS. HUTSON:] Okay.

[SGT. LUTHER:] Yes, they re-seal it and put their initials and date on it as well.

[MS. HUTSON:] Okay. So it gives us a chain of custody so that we know that the blood that was originally drawn back in the hospital is still the blood that we have -- that we would have here today.

[SGT. LUTHER:] Correct.

[MS. HUTSON:] But we don't have that, right?

[SGT. LUTHER:] No, ma'am.

[MS. HUTSON:] Okay. Don't want to beat you up on that.

[SGT. LUTHER:] No, I am already doing it to myself.

[MS. HUTSON:] And so that is the -- really the only way that we can prove to this jury and to this Court -- that the state can prove to this Court that that is the blood that was originally drawn and tested, is that correct?

[SGT. LUTHER:] That would help.

(III R.R. 164-65.)

The State next calls the laboratory chemist, Gene Hanson. (III R.R. at 166.) Prior to beginning of Hanson's testimony, Appellant requests to voir dire the witness outside the presence of the jury, but this request is denied. (III R.R. at 166.) After qualifying Mr. Hanson as a certified chemist, the State begins to inquire about

whether Mr. Hanson had tested a vial of Appellant's blood, to which Appellant objects. (III R.R. at 168.) The jury is excused for a hearing outside their presence. (III R.R. at 169.)

During this hearing, Appellant objects to the continued testimony of the chemist, arguing that the lost chain of custody evidence rendered the blood results inadmissible because it cannot be proven that the blood tested by the lab came from Appellant. (III R.R. at 170.) Appellant then requests a mistrial based upon the prejudice brought to Appellant by the State disclosing the blood results during opening statements when it knew that the underlying physical evidence was lost and that Appellant would be denied an opportunity to confront the State's witnesses over the information contained on the underlying physical blood evidence. (III R.R. at 170-71.) The State responds by arguing that a mistrial is inappropriate and that any error could be cured by a limiting instruction. (III R.R. at 172.) Appellant responds directly to this limiting instruction argument, stating:

> [MS. HUTSON:] And finally to -- granted, this jury doesn't have to believe anything I say and they don't have to believe anything Mr. Landes says. But to stand in your opening remarks and tell them that you have proof that blood was drawn and that that blood alcohol level was .169, there is no way that that meant that you can tell that jury to disregard that. They will never forgot those numbers, they're in their head from now on. So yes, I am asking for a mistrial.

(III R.R. at 176-77.)

After a brief voir dire of the chemist outside the presence of the jury, the trial court overrules Appellant's objection and instructs the State to proceed with the chain of custody testimony in front of the jury, but to approach the bench prior to offering the actual blood results for a ruling. (III R.R. at 188.)

The jury is brought back in and Mr. Hanson is examined on his qualifications as an expert. (III R.R. at 190.) Mr. Hanson testifies that his notes indicated that he received a blood kid labeled "COR 131003993," that it is his practice to verify that a specimen's label matched the number on the submission form which contained Appellant's name, and that in this case his notes indicated that the blood tube was labeled with "John Lee" while the box was labeled "John Kenneth Lee." (III R.R. at 192-94.) The chemist then authenticates that a copy of the laboratory results marked as an exhibit is the same as the results in his records. (III R.R. at 199-200.)

The jury is then excused to that the trial court can hear arguments regarding whether or not the laboratory results should be admitted into evidence. (III R.R. at 200-05.) Appellant objected to the admission of the blood evidence once again, arguing that there is no chain of custody, that Appellant has a right to confront the State's witnesses regarding this chain of custody, and that even if the trial court were to assume that the blood tested by the chemist was taken from Appellant, the State could not prove whether this was the first sample taken under a mandatory blood draw or the second sample taken hours later under a search warrant. (III R.R. at

203.) Finally, after three separate hearings outside the presence of the jury, the trial court rules that the blood results were inadmissible. (III R.R. at 205.)

The jury is brought back in, and both the State and Defendant rest and close. (III R.R. at 207.) The jury recesses and Appellant again moved for a mistrial based upon the State's disclosure of blood results in the State's opening statement that were not admitted into evidence, which is denied by the trial court. (III R.R. at 208.) Appellant is later convicted of driving while intoxicated and sentenced to one hundred eighty (180) days in the county jail. (I C.R. at 32, 37.)

SUMMARY OF THE ARGUMENT

There is no common sense reason for this Court to interpret the instant case in a manner that would encourage prosecutors to disclose the results of scientific tests before those results are admitted into evidence in driving while intoxicated cases. Nowhere in the State's brief are the findings made by the court of appeals that the blood results were inadmissible at the time of the State's opening statement clearly rebutted as legally erroneous. Furthermore, the argument that the State had a "good faith" belief that the results were admissible is a distinction that does not make a legal difference in this case, as it has no bearing on the harm analysis conducted by the court of appeals. Texas jurisprudence should discourage the disclosure of scientific test results in opening statements in criminal trials regardless of whether or not the party disclosing those results is acting in good faith.

The State's arguments that Appellant waived this issue by failing to object during opening statements ignore this Court's own standards for how waiver is determined for motions for mistrial. Texas jurisprudence clearly allows for a motion for mistrial to be reviewed on appeal when no other remedy is available for incurable error brought to the attention to the trial court and a mistrial is denied. The State's waiver argument also fails to give proper credit for the continuous objections made after the State's opening statement that were all overruled by the trial court, a finding made by the court of appeals that has not been contested by the State.

Finally, the State's argument that a limiting instruction would have been sufficient to cure error in the instant case is premised on a much narrower interpretation of unfair prejudice than that found by the court of appeals. The State also offers very little analysis for how the court of appeals erred in finding that a limiting instruction made at every mention of the blood test would actually increase the harm from the unfair prejudice caused to Appellant from the State's erroneous disclosure of the inadmissible blood results. The State's interpretation of limiting instructions seems to assume that such instructions operate as a magical legal fiction that will literally cure any imaginable error. However, this Court need only look at the longstanding jurisprudence regarding inadmissible polygraph results to determine that when the results of an inadmissible scientific test used to determine

intoxication are disclosed to a jury in a case involving intoxication as a substantial issue of fact, to find that such errors are generally incurable by any remedy other than a mistrial. Because the error of disclosing the inadmissible blood results to the jury was incurable by any lesser remedy, this Court should affirm the court of appeals holding that the trial court abused its discretion by denying Appellant's motion for mistrial.

ARGUMENT

I. This Court should affirm the court of appeals' holding that the denial of Appellant's motion for mistrial after blood results were lawfully excluded from evidence was an abuse of discretion based upon the State's erroneous disclosure of those test results during opening statements

The court of appeals found that the trial court erred in failing to grant Appellant's motion for mistrial after the State announced the results of blood-alcohol test in opening statements knowing that the physical evidence and chain of custody documentation for the blood results were destroyed prior to trial, and the results were therefore inadmissible. *Lee v. State*, No. 13-15-00514-CR, 2017 WL 2608304, at *9-10 (Tex. App.—Corpus Christi 2017, pet. granted) (mem. op. not designated for publication) In spite of this holding, the State asserts that this Court should reverse the court of appeals because this evidence was offered in good faith under Tex. C. Crim. Proc. 36.01. State's Brief on the Merits at 22-23.

A. A trial court's denial of a motion for mistrial is reviewed by appellate courts for an abuse of discretion

Texas appellate courts review a trial court's ruling on a motion for mistrial under the standard of abuse of discretion. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). While this discretion is afforded "great deference" on appeal, a trial court's rulings on motions for mistrial are "not insulated from appellate review." *Pierson v. State*, 426 S.W.3d 763, 774 (Tex. Crim. App. 2014). The trial court's ruling will be upheld if it falls within the "zone of reasonable disagreement." *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). A ruling is said to fall outside this zone when the trial court's ruling appears either arbitrary or unreasonable when viewed objectively, without subjecting the reviewing court's judgement for that of the trial court. *Id*. An abuse of discretion is therefore found when "no reasonable view of the record could support the trial court's ruling." *Id.*

Mistrials are only considered an appropriate remedy in the "extreme circumstances" where error at trial is both highly prejudicial and incurable, rendering any further time and expense spent at trial to be futile. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Due to this extremity, a trial court's denial of a mistrial will be upheld if the error could

have been cured by less extreme measures, such as a limiting instruction. *Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004) (en banc). However, requesting a limiting instruction is not a prerequisite for preserving error on a motion for mistrial so long as the error could not be cured by such an instruction. *Ocon v. State*, 284 S.W.3d 880, 884-85 (Tex. Crim. App. 2009). If a limiting instruction "could not have had such an effect, the only suitable remedy is a mistrial, and a motion for a mistrial is the only essential prerequisite to presenting the complaint on appeal." *Young*, 137 S.W.3d at 70. "Faced with incurable harm, a defendant is entitled to mistrial and if denied one, will prevail on appeal." *Id.*

B. This Court should affirm the court of appeals finding that the blood evidence was known to be inadmissible at the time of the State's opening statements because Texas law has long required the presence of physical evidence at trial to connect unknown substances to the criminally accused before admitting gas chromatograph results

Instead of enlightening us all to their novel legal theory on authenticating physical evidence that no longer exists, the State instead argued to this Court that chain of custody was "sufficient if it is established up to the point the evidence reaches the laboratory." State's Brief on the Merits at 23.

As authority for this argument, the State cites *Medellin*, a case involving heroin, where a chemist failed to testify to a gap in the chain of custody, specifically "from the time [the heroin] was placed in the vault at 11:30 a.m. on March 23, until the time he removed it from the vault the next day." *Medellin v. State*, 617 S.W.2d

229, 231 (Tex. Crim. App. 1981). The *Medellin* court correctly found that this testimony of a gap in the chain of custody went to weight and not the admissibility of the evidence. *Id.* (citing *Norris v. State*, 507 S.W.2d 796 (Tex. Crim. App. 1974)).

However, the instant case is distinguishable from *Medellin* because it does not deal with a gap in the chain of custody, but instead whether the State's witnesses could establish that the blood sent to the lab to be tested by the chemist was in fact the same blood that was legally drawn from Appellant. Seven years prior to *Medellin*, the *Jones* court held that for evidence of laboratory testing to be properly admitted, evidence of a chain of custody must be sufficient to connect the accused with the evidence tested at the laboratory. *Jones v. State*, 538 S.W.2d 113, 115 (Tex. Crim. App. 1976). In *Jones*, an officer testified that he saw the defendant toss a balloon out of his vehicle's window. *Id.* at 114. The officer found the balloon, and believed that the balloon contained heroin. *Id.* The defendant was arrested and the officer initialed the balloon before delivering it directly to a police chemist, who testified that the balloon contained heroin and identified the balloon based on his own initials placed on the balloon. *Id.* However, the balloon was never identified by the arresting officer as being the balloon that he saw being tossed from defendant's vehicle. *Id.* The *Jones* court found that because the chain of custody could not connect the substance to the defendant, the evidence was

insufficient to convict the defendant of possession of a controlled substance. *Id.* at 115.

In the instant case, this Court should find that, like the balloon of heroin that was never identified by the officer who first came into contact with it in *Jones*, the fact that the phlebotomist who collected the sample could not testify that the blood vial tested by the chemist was the same sample drawn from Appellant under the search warrant, (III R.R. at 152, 200-03), rendering the blood results inadmissible due to a failure to establish sufficient evidence of the chain of custody. *See id.* at 115.

This chain of custody issue is further muddled by the fact that two samples were drawn from Appellant, but only one of those samples was tested by the lab. At trial, the chemist could not testify to whether the sample he tested was drawn under the authority of a mandatory blood draw statute or under the search warrant. (III R.R. at 203.) Under *State v. Villarreal*, relying on the mandatory blood draw statute was found to be an unconstitutional warrantless search, forcing the State to instead rely on exigent circumstances to uphold warrantless blood draws. 475 S.W.3d 784, 814 (Tex. Crim. App. 2014).

Without addressing the issue of whether the State was acting in "good faith," the court of appeals simply found that because one of the blood vials was inadmissible under *Villarreal*, without the required "physical evidence to determine

which blood sample was submitted, the State attempted to introduce evidence that it knew was inadmissible during its opening statement." *Lee*, 2017 WL 2608304, at *10. In a footnote, the court of appeals also firmly rejects the State's theory that *Villarreal* was not binding precedent at the time of trial. *Id.* at *10, fn. 3. Failing to even cite to *State v. Villarreal* in its brief on the merits, the State *still* will not concede that the State knew the blood results were inadmissible under *Villarreal* at the time of opening statements, even though the record indicates that a blood warrant was prepared by the State at the time of arrest in an attempt to cure any taint from the unlawful mandatory blood draw. (*See* III R.R. at 59 (stating that law enforcement was encouraged to get a search warrant to get a second blood warrant by the district attorney after the mandatory blood draw).)

C. This Court should affirm the court of appeals because Texas jurisprudence does not require an analysis of a party's "good faith" during opening statements when determining error on a motion for mistrial

However, even though the State continues to assert its "good faith" belief that the evidence was admissible despite the destruction of its only method of proving chain of custody, the State's legal basis for this faith has not once been clearly articulated. At trial, Appellant argued repeatedly that the predicate to authenticate the blood test results required both the phlebotomist and the forensic chemist to identify the actual, physical blood vials in their hands in front of the jury to prove

that the blood tested by the forensic chemist was the same blood drawn from Appellant by the phlebotomist. (*See, e.g.*, III R.R. at 144, 170, 184, 201, and 203.) Despite these objections, the State never articulated how it cleverly planned to accomplish to this task without the physical evidence that had been destroyed. It wasn't until after the forensic chemist testified and was not able to identify from his records which of the two blood vials that was drawn as a result of the offense were sent to the lab to be tested—the blood drawn under the authority of an unconstitutional statute or the blood drawn pursuant to a search warrant—that the trial court finally ruled that the blood results were inadmissible. (III R.R. at 202-05.)

While a prosecutorial misconduct issue was raised by Appellant in a motion for new trial, that argument was abandoned as part of counsel's appellate strategy. Nevertheless, the State has continued to baselessly assert this "good faith" argument to both the court of appeals and now to this Court, without ever taking the time to articulate its specific legal theory for getting around the evidentiary problem created by destroying the only evidence available to establish chain of custody for which of the two blood vials was sent to the laboratory for testing. What this author finds absolutely astonishing is despite the fact that Appellant was courteous enough to abandon the issue of prosecutorial misconduct when it became clear that the issue was not necessary to prove that the trial court's denial of the motion for mistrial was

an abuse of discretion, and despite the fact that the court of appeals showed great restraint in finding error without mentioning the issue of "good faith," somehow the State has the gall to continue to assert that it was acting in "good faith" when it disclosed the blood results to a jury without any logical way of authenticating those results with a blood vial legally drawn from Appellant. Even more astonishing is the new argument before this Court that the court of appeals erred because it was required to find evidence of "bad faith," which seems to be a peculiar case of being somewhat careless in what you ask for.

"Good faith" is what caused Appellant's trial counsel to be caught so off guard by the State's opening statement that an objection was not made to the disclosure of the blood results that were clearly inadmissible, for better or worse. "Good faith" is what the trial court had in the State when it allowed—over numerous objections—for the State to call witnesses to the stand in an attempt to prove up the existence of blood evidence that had been carelessly destroyed by law enforcement. This "good faith" evaporated the moment the State's bluff was called at trial and it failed to offer a single plausible theory for how prosecutors believed the blood results would be admissible when they disclosed the blood results to the jury, even though it was by then clear that neither the phlebotomist nor the chemist could identify which blood vial was sent to the laboratory to be tested.

Despite the muddling of legal standards attempted by the State, the court of

appeals was correct when it made no findings of the State's intent—repugnant or otherwise—in finding that error was committed by the State when it disclosed the results of the blood test when it knew that the results were not admissible. This is the only conclusion that can be supported by the record. The State's persistently unwarranted assertions of "good faith" do nothing to rebut the overwhelming evidence that the State knew or should have known that the blood results were inadmissible, which is the entire reason why two blood samples existed in the first place. In reality, what the State is advocating for is an interpretation of this Court's jurisprudence in regards to Tex. C. Crim. Proc. art. 36.01 to allow for prosecutors to disclose facts which are expected to be proven by the State based not upon a standard of "good faith," but instead a standard of "blind faith."

D. This Court should discourage prosecutors from disclosing scientific test results before the tests are admitted into evidence as a matter of public policy

If this Court were to discern error by the court of appeals with regards to this issue, if anything, Appellant would argue that the court of appeals' analysis may inadvertently imply any requirement *at all* for the State to have knowledge of whether or not evidence is admissible when appellate court's review a motion for mistrial based upon disclosures made during opening statements. As a matter of public policy, it is an inherently risky proposition to disclose the results of scientific evidence *before it is admitted* when the predicate for admitting that evidence requires

both the qualification of expert witnesses and chain of custody authentication testimony from multiple witnesses. This is particularly true in cases involving intoxication, where blood or breath results are by definition sufficient evidence of guilt for the most significant and most commonly contested element of those offenses at trial.

In the event that such a practice of disclosing blood or breath results by prosecutors in opening statements were to become common, one could imagine many cases where criminal defendants would find themselves in the same situation as Appellant simply because a witness became unavailable during trial that was necessary to prove up those results before they were admitted. Projected long term, the policy implications of such a practice could justify defense counsel around the State to urge lengthy pretrial hearings over the admissibility of these test results just to protect themselves from claims of ineffectiveness.

The real world implications of finding harmless error in a case like this could be anything but harmless to the dockets of county courts statewide that are already overwhelmed by driving while intoxicated cases pending trial. Such a scenario would significantly increase the burden on trial courts, all because prosecutors in Victoria County don't want to be limited by the common sense proposition of waiting until after blood or breath evidence is admitted before disclosing those results to the jury.

II. This Court should affirm the court of appeals finding that Appellant's failure to object during opening statements to the erroneous disclosure of inadmissible blood results did not forfeit appellate review because Texas jurisprudence does not preclude appellate review of a motion for mistrial in cases without previous objections.

The State argues that Appellant forfeited any claim to error by failing to make a timely objection to the blood results when the State told the jury that Appellant's blood alcohol concentration was twice the legal limit at 0.169 in opening statements, evidence that was later excluded by the trial court. State's Brief on the Merits at 15. However, while waiver rules can apply to remarks made in opening statements, the court of appeals correctly applied this Court's jurisprudence when it found that error had not been waived.

A. This Court generally discourages a hyper-technical approach to preservation of error and will not find an objection untimely when error was unforeseeable at the time an objection could have prevented error

With regards to preserving error generally, this Court's jurisprudence has consistently eschewed the use of a hyper-technical approach to preservation of error in criminal cases, instead sticking firmly to the standard "in order for an objection to preserve error, the objecting party must . . . 'let the trial the trial judge know what he wants, why he thinks he's entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.'" *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). This Court has

held that because the purpose of the timeliness requirement is to force parties to object to errors before they occur, a party's objection cannot be said to be untimely unless the error is reasonably foreseeable. *Barnett v. State*, 189 S.W.3d 272, 278 (Tex. Crim. App. 2006). Furthermore, this Court has rejected the argument that a motion for mistrial was not timely or specific when the objection was lodged at the time when it can be said that it was reasonably clear that the trial court's actions were objectionable. *Cook v. State*, 390 S.W.3d 363, 369 (Tex. Crim. App. 2013).

The State argues that because Appellant knew the blood results were inadmissible the day before trial, Appellant should have known to object immediately when the State announced the results of the blood test to the jury in opening statements. State's Brief on the Merits at 17. The circular nature of this logic becomes apparent when you expand the argument to include the State's "good faith" rationale. Essentially, the State is asking this Court to conclude Appellant waived error based on the following premises:

(1) Because Appellant knew the physical evidence was destroyed before trial, it was reasonably foreseeable that the results from testing that evidence was inadmissible at the time of the State's opening statements;

(2) Even though the physical evidence was destroyed, the State could not reasonably foresee that the testing results from that evidence was inadmissible at the time of the State's opening statements;

(3) Despite Appellant's continuous, specific, and vociferous objections to the witnesses called to testify to the blood results, the State continued to act in "good faith" to prove up the results disclosed in opening statements in front of the jury, results that were later ruled inadmissible;

(4) Any error from this testimony was waived because Appellant should have foreseen the need for a timelier objection when Appellant first knew that the State lacked "good faith" for the blood results to be disclosed in opening statements, whether or not contrary representations by the State were expressed or implied to the trial court in order to allow further testimony to be presented to the jury.

Such reasoning is reminiscent of the famous catchphrase of the popular cartoon character Bart Simpson: "I didn't do it, nobody saw me do it, you can't prove anything."

To be sincerely persuaded by the State's logic on this issue, one would have to assume that a reasonable defense attorney should anticipate that a reasonable prosecutor would ever disclose to a jury in opening statements the test results of physical evidence that was destroyed and therefore inadmissible. This logic further assumes that a reasonable defense attorney should foresee and be prepared to object to what would hypothetically qualify as potential prosecutorial misconduct, but simultaneously asserts that a reasonable prosecutor could still believe the disclosure falls within "good faith" and is therefore proper. In making these assumptions, the State is urging this Court to apply two completely different standards for what qualifies as reasonable behavior by prosecutors on appeal and what criminal defense attorneys are expected to anticipate as reasonable prosecutor behavior at trial in order

to remain effective. Advocating for such a rule goes beyond "hyper-technical" to what appears from Appellant's admittedly-biased perspective to be a party-based, outcome-determinative standard for evaluating error on appeal.

B. The court of appeals properly applied this Court's jurisprudence regarding motions for mistrial where error is so incurable that no lesser remedy was available

In addition to being circular and hyper-technical, the State's argument on this issue conveniently ignored the authority cited by the court of appeals with regards to preserving error for appellate review of motions for mistrial. This Court distinguished general preservation of error from preservation of error in cases specifically involving a motion for mistrial in *Young v. State*, a case that was cited extensively by the court of appeals in discussing the issue of waiver as applied to the motions for mistrial in the instant case. *See Lee v. State*, No. 13-15-00514-CR, 2017 WL 2608304, at *7-8 (Tex. App.—Corpus Christi 2017, pet. granted) (mem. op. not designated for publication) (citing *Young v. State*, 137 S.W.3d 65 (Tex. Crim. App. 2004) (en banc)). Even though it appears that *Young* is in fact the leading case by this Court regarding preservation of error on motions for mistrial, the State never even addresses the court of appeals findings of whether the instant case was reviewable on appeal based on *Young*, instead focusing on more general rules of preservation of error that give the State's position a much more obvious—but legally misplaced—advantage.

Under *Young*, a trial court abuses its discretion when it fails to grant a motion for mistrial in "those cases in which an objection could not have prevented, and an instruction to disregard could not cure the prejudice stemming from an event at trial—i.e., where an instruction would not leave the jury in an acceptable state to continue the trial." *Young*, 137 S.W.3d at 69. In order for a complaint to be reviewable on appeal, the complaint should be raised at trial either in the form of "(1) a timely, specific objection, (2) a request for an instruction to regard, [or] (3) a motion for mistrial." *Id*. The key factor is not whether all of these objections occur in sequence, but rather whether there was "a timely, specific request that the trial court refuses." *Id.* Failing to object to an "objectionable event . . . before a party could reasonably have foreseen it . . . will not prevent appellate review." *Id.* at 70. "Faced with incurable harm, a defendant is entitled to a mistrial and if denied one, will prevail on appeal." *Id*.

Based on *Young*, Appellant was not entitled to a mistrial until incurable harm occurred at trial. *See id.* As soon as Appellant's trial counsel realized what kind of games the State was trying to play, she did everything a reasonable defense attorney can be expected to do to alert the trial court to the fact that the State couldn't deliver the evidence it promised to the jury. Perhaps it was the trial court's "good faith" in the State that led to the decision to allow the State the opportunity to cure the presumptive error created by the State's opening statements in front of the jury.

What proceeded, however, was a lengthy, clearly objected-to, and highly prejudicial gamble that failed to prove that the blood results disclosed by the State were from the same blood vial that was lawfully drawn from Appellant under a search warrant. This was the moment at trial, when Appellant's final motion for mistrial was denied, that the full extent of the unfair prejudice to Appellant by the State's disclosure and attempts to admit evidence it knew was inadmissible.

While the State focuses on how timely objections and requests for jury instructions could have cured any harm for its erroneous disclosure of the blood results in opening statements, the State was the party with the responsibility for curing the harm it *created* in opening statements by actually proving up the evidence that its agents were responsible for destroying and that it *still* claims to have "good faith" for leaking to the jury. Because Appellant's motion for mistrial after the trial court denied the admission of the blood test results constituted "a timely, specific request that the trial court [refused]," this Court should affirm the court of appeals' finding that error was not waived when Appellant failed to object to the erroneous and unforeseeable disclosure of the blood results in opening statements. *See Young*, 137 S.W.3d at 70.

C. Adopting the State's interpretation of waiver would severely harm the due process rights of criminal defendants surprised by unforeseeable error by prosecutors attempting to leverage modern waiver jurisprudence as an advantage at trial

As a matter of public policy, *Young* upholds significant precedent regarding the preservation of error that this Court should emphatically enforce in the instant case. As modern Texas jurisprudence grows, the need for criminal defendants to take a last ditch stand when outflanked by aggressive prosecutorial tactics that rely on playing cat and mouse with preservation of error at trial is now commonplace, and due process absolutely requires a tool that allows for a criminal defendant to make an equitable "Hail Mary" motion for a mistrial to cure otherwise incurable errors and preserve those errors for appeal. Without the preservation of error protection offered by *Young*, an already arduous analysis of arguing a motion for mistrial was improperly denied on appeal would become nearly impossible, and the only remedies left will be arguments regarding ineffective assistance of counsel and prosecutorial misconduct.

The net result of either reversing or weakening the preservation of error protection offered under *Young* for motions for mistrial could eventually turn the practice of criminal law into something that resembles the practice of civil law, but with tighter deadlines, fewer rules, and stakes much higher than fighting over money. Such a reality would have the unintended consequence of forcing criminal

defense attorneys to litigate more and more evidentiary issue pretrial, and slow down jury trials with hyper-technical objections and countless bench conferences on increasingly-complicated motions in limine. As a practical matter, this is not a model that is sustainable under current Legislative assumptions about what constitutes proper funding for its present statutory mandates, or where large municipalities are targeted in Federal courts by multi-million dollar civil rights actions over issues involving indigent defense.

III. This Court should affirm the court of appeals holding that the trial court abused its discretion in denying Appellant's motion for mistrial because Appellant was incurably harmed by the State's erroneous disclosure of the inadmissible blood results that the State recklessly attempted to prove up in front of the jury

Determining if error at trial required a mistrial is informed by the particular facts of the case. *Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016). "Whether a mistrial should have been granted involves most, if not all, of the same considerations that attend a harm analysis." *Hawkins*, 135 S.W.3d at 77.

A. Whether the erroneous disclosure of inadmissible test results in a driving while intoxicated case constitutes reversible error is an issue of first impression for this Court

After substantial research, Appellant believes that the issue of whether the harm of disclosing the results of an inadmissible blood test in opening statements constitutes an error so incurable that a mistrial is the only reasonable remedy is one of first impression before this Court. While this is not the first time that the State

had erroneously disclosed blood results in a DWI trial, there were no cases found within the scope of Appellant's research where the State disclosed results in opening statements, the trial court ruled that the results were inadmissible, but then the trial court denied a motion for mistrial.

While the State has argued that the court of appeals harm analysis undermines the jurisprudence of this Court because it offers no previous authority for its holding, Appellant's has a simpler explanation for why no prior authority can be found. Because the error of disclosing inadmissible blood or breath results to a jury is so inherently fundamental, Appellant believes that this issue has literally never before been handled on an appeal instead of at trial. In other words, prior to the repeal of the fundamental error doctrine, most prosecutors weren't bold enough to try this stunt in a jury trial and those who were did so in front of trial courts who had the foresight to utilize their discretion swiftly without the waste of recording and preserving potentially reversible error on appeal.

Appellant's point here is not to criticize this Court's modern doctrines on waiver and harmless error, but to raise a concern that the instant case represents a very hard line for the limits of how far the State should be allowed to push the limits of modern waiver and harmless error doctrines over time and still fall within the bounds of due process. The ultimate challenge for Appellant on this case has never been explaining how unjustly prejudicial the State's actions were at trial; the

challenge instead has always been how to take this fundamentally unfair act and properly analyze it under the modern standards of abuse of discretion, waiver, and harmless error in a manner that is consistent with this Court's current jurisprudence.

B. The court of appeals' harm analysis under *Mosley* was consistent with this Court's jurisprudence regarding appellate review of a trial court's denial of a motion for mistrial

Appellant concedes that the court of appeals did a far superior job of separating the issues and analyzing the instant case under the proper frameworks required by this Court than Appellant was able to in its initial brief to the court of appeals. The most striking example of this is the court's analysis of harm, where the court of appeals rigorously applied the three-factor test articulated by this Court in *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), which balances "(1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction)." *Lee v. State*, No. 13-15-00514-CR, 2017 WL 2608304, at *11 (Tex. App.—Corpus Christi 2017, pet. granted) (mem. op. not designated for publication) (citing *Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007) (quoting *Ramon v. State*, 159 S.W.3d 927, 929 (Tex. Crim. App. 2004))). While the same courtesy was not shown by the State when claiming that the court of appeals offered no authority for its findings,

Appellant's research indicates that the court of appeals reliance on *Mosley* was consistent with the jurisprudence of this Court and will also analyze harm using the three factors enunciated by the *Mosley* court.

Under the first *Mosley* factor, the court of appeals correctly found that that the magnitude of the harm caused by the State disclosing the blood results to the jury during opening statements, then failing to admit these blood results through the testimony of multiple witnesses offered in front of the jury was overwhelmingly prejudicial. *Id.* at *12-13. While the State has consistently focused on limiting any harm analysis to the prejudice of disclosing the test results in opening statements, the court of appeals focused on the totality of the record, and included the compounding effect that reinforcing these blood results by offering testimony regarding taking and testing blood in front of the jury rather than having a hearing outside the presence of the jury to determine whether the blood results were admissible. *Id.* at *13. Pointing out that the State had the burden to establish a proper chain of custody for the specimen, citing *Mitchell v. State*, 419 S.W.3d 655, 660 (Tex. App.—San Antonio 2013, pet. ref'd), the court of appeals found that the State failure to establish that "the blood drawn from [Apellant] Lee was the same blood delivered to be tested at the DPS crime lab," along with "the trial court's allowance of Salazar [the phlebotomist] and Hanson [the chemist] to testify regarding the blood evidence ensured the blood results being reinforced to the jury

despite being inadmissible, and therefore, any lesser remedy than a mistrial would be futile. *Id.* at *13 (citing *Young*, 127 S.W.3d at 69). The State has offered no rebuttal to the court of appeals expansive analysis of prejudicial effect under the first *Mosley* factor, instead choosing to minimize prejudice to try to strengthen the argument that any prejudice should have been cured by a limiting instruction.

Under the second *Mosley* factor, the court of appeals examined the totality of the cumulative prejudice that was found under the first *Mosley* factor and analyzed whether the lesser remedies of objections or a limiting instruction would have cured the prejudice. *Id.* at *13-14. Here the court of appeals correctly points out that while no objection was made during opening statements, Appellant "Lee objected multiple times throughout the remainder of the trial as the State attempted to introduce the blood evidence through multiple witnesses," and that the trial court overruled every one of these objections until the final objection to the admission of the blood results. *Id.* at *13. The court of appeal noted that while the trial court denied a total of four separate motions for mistrial by Appellant, it did include a limiting instruction in the jury charge regarding arguments of the attorneys not being considered evidence. *Id.* at *14. The court of appeals ultimately found this instruction to be insufficient to cure the overwhelming prejudice created by disclosing and continuously referring to the blood results, noting that an "instruction to disregard each and every time the blood evidence was referred to would have lost

the intended effect of the instruction." *Id.*

Under the third *Mosley* factor, the court of appeals correctly found that because "the State introduced evidence without laying any type of foundation or proper predicate which was determined to be inadmissible, we cannot find there is a certainty that [Appellant] Lee would have been convicted without the disclosure of the blood evidence based on the facts of this case." *Id.* at *15. The court of appeals noted that while other evidence of intoxication existed at trial, "the crux of the trial focused on the blood evidence and the State's multiple attempts to admit the blood evidence." *Id.* at *14-15. By starting with disclosing that the blood results "were twice the legal limit" knowing that the blood vials and chain of custody documentation had been destroyed, then spending a bulk of the trial attempting and failing to admit the blood results, the court of appeals concluded the only reasonable conclusion that the record can support was that it is not possible to say with certainty that Appellant would have been convicted but for the errors committed by the State regarding the blood evidence. *Id.*

C. Holding that the trial court abused its discretion by denying a mistrial after inadmissible scientific test results were disclosed to the jury is consistent with this Court's jurisprudence

Like the court of appeals, this Court should find the attempt to minimize the scope of unfair prejudice caused by the State's repeated efforts to improperly admit blood evidence that it knew to be inadmissible neither credible nor persuasive.

Furthermore, the State's interpretation of the effectiveness of limiting instructions is so obviously partisan and removed from the realities of the real-world impact of blood results on jurors that the State might as well be advocating for the abolishment of motions for mistrial as a remedy for criminal defendants at trial altogether. Unlike the State, the court of appeals viewed the evidentiary value of blood results in an intoxication trial the same manner in which jurors would, as a "lie detector test" for criminal defendants who claim as a defense that they were not intoxicated at the time they operated a motor vehicle.

The power of blood results evidence as an intoxication "lie detector test" for juries in cases focused on intoxication is why this Court should treat blood results that are disclosed to the jury but not admitted into evidence the same way this Court treats motions for mistrial after the disclosure of polygraph results. As a matter of law, polygraph results are not admissible during the trial of criminal cases. *Romero v. State*, 493 S.W.2d 206, 210-11 (Tex. Crim. App. 1973). "Numerous cases have held that where a witness gives a nonresponsive answer that mentions that a polygraph test was offered or taken, but does not mention the results of such test, there is no error in failing to grant a mistrial." *Kugler v. State*, 902 S.W.2d 594, 595 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (citing *Richardson v. State*, 624 S.W.2d 912, 914-15 (Tex. Crim. App. 1981) ("no error where complainant stated in a nonresponsive answer to prosecutor's question that she had taken a polygraph

exam"); *Hannon v. State*, 475 S.W.2d 800, 803 (Tex. Crim. App. 1972) ("no error where witness gave nonresponsive answer that indicated he had been put on a lie detector machine"); *Roper v. State*, 375 S.W.2d 454, 457 (Tex. Crim. App. 1964) ("no error where officer disclosed that defendant had been given a polygraph exam where answer was nonresponsive and did not reflect the result of the test"); *Barker v. State*, 740 S.W.2d 579, 583 (Tex. App.--Houston [1st Dist.] 1987, no pet.) ("no error where officer stated in an nonresponsive answer to prosecutor's question that the defendant had been offered a polygraph exam"); *Richardson v. State*, 823 S.W.2d 710, 712 (Tex. App.—San Antonio 1992, pet. ref'd) ("no error where officer disclosed in an nonresponsive answer to prosecutor's question that defendant submitted to polygraph exam")). "Where the defense insists on a mistrial, the sufficiency of an instruction to disregard polygraph evidence generally depends on whether the results of the examination were revealed to the jury." *Wright v. State*, 154 S.W.3d 235, 239 (Tex. App.—Texarkana 2005, pet. ref'd) (citing *Sparks v. State*, 820 S.W.2d 924, 927 (Tex. App—Austin 1991, no pet.)); *see, e.g.*, *Robinson v. State*, 550 S.W.2d 54, 61 (Tex. Crim. App. 1977); *Nichols v. State*, 378 S.W.2d 335, 338 (Tex. Crim. App. 1964); *Jones v. State*, 680 S.W.2d 499, 502 (Tex. Crim. App. 1983).

Given that the question of whether disclosure of inadmissible blood results is incurable seems to be an issue of first impression, the State's criticism of the court

of appeals for a lack of precedent cited regarding whether this issue was cured by the limiting instruction given at trial is somewhat misleading. There is analogous case law, decades of cases involving the mere mention of polygraph tests, all of which hold that an instruction to disregard is not sufficient to cure error when the results of the inadmissible test were disclosed to the jury. The court of appeals did not consider this analogy, instead limiting the holding of its memorandum opinion to only the facts of Appellant's specific case. However, on the State's urging, this Court is now in a position to rule in a much more binding and expansive manner than the court of appeals chose to do.

As such, this Court should consider the case against cases involving the disclosure of inadmissible polygraph results, legal precedent that represents the best analogy our jurisprudence has for measuring the incurable prejudice that erroneously disclosed results of inadmissible scientific test performed by experts have on juries against the curative limits of remedies less severe than mistrial. This jurisprudence is significant for criminal defense advocates because, in *Ex parte Bryant*, this Court narrowly side-stepped a *per se* rule that the disclosure of inadmissible polygraph tests without objection falls below the objective standard of reasonableness as applied to ineffective assistance of counsel claims in determining whether defense counsel performance was deficient. *Ex parte Bryant*, 448 S.W.3d 29, 39 (Tex. Crim. App. 2014). Instead, this Court held "that, although the introduction of

polygraph evidence almost always falls below an objective standard of reasonableness because most attorneys will have no reasonable strategy in allowing the introduction of such evidence, we cannot categorically exclude the possibility that a trial attorney, under certain circumstances, could use the admission of polygraph evidence to his client's favor." *Id.* (emphasis added).

If defense counsel are to be held to a standard this high when it comes to preventing the disclosure of inadmissible scientific evidence under *Ex parte Bryant*, then prosecutors should also be held to the same high standard when inadmissible scientific evidence is disclosed and offered into evidence over numerous defense objections, regardless of whether or not the prosecutors were acting willfully. This Court should take a strong stand against such reckless actions by prosecutors without further shifting the burden to criminal defendants to overcome an unwritten presumption of prosecutorial "good faith," forcing trial court's to enter the murky waters of prosecutorial misconduct before exercising reasonable discretion and granting timely motions for mistrial in cases where the State's actions during opening statements were fundamentally unfair. For these reasons, this Court should affirm the court of appeal's holding that the trial court abused its discretion by denying Appellant's motion for mistrial after blood results that were disclosed to the jury were found to be inadmissible.

PRAYER

For these reasons, Appellant prays that this Court affirms the court of appeal's opinion that reverses Appellant's conviction for driving while intoxicated.

Respectfully submitted,

/S/Arnold Hayden
Arnold Hayden
State Bar No. 24065390
The Law Office of Arnold Hayden
P.O. Box 4967
Victoria, Texas 77903
Tel: (361) 573-4393
Fax: (361) 573-4394

ATTORNEY FOR APPELLANT
March 13, 2018

CERTIFICATION OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4, I hereby certify that this brief contains 9,762 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/S/Arnold Hayden
Arnold Hayden
Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served upon the Honorable Stephen Tyler, Criminal District Attorney of Victoria County, 205 N. Bridge St., Ste. 301, Victoria, TX 77901, by electronic service on March 13, 2018, pursuant to the Texas Rules of Appellate Procedure.

/S/Arnold Hayden
Arnold Hayden
Attorney for Appellant